Office-Supreme Court, U.S.
FILED
AUG 7 1981
ALEXANDER L. STEVAS, CLERK

No. 80-1906

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALLIED INTERNATIONAL, INC.,

Cross-Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Local 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATES, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO, and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO, and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE TO CROSS-PETITION FOR A WRIT OF CERTIORARI

THOMAS W. GLEASON
One State Street Plaza
New York, N.Y. 10004
(212) 425-3240

CONDON & DOYLE
75 Federal Street
Boston, MA 02110
(617) 542-4666

Attorneys for Cross-Respondents

Of Counsel:
ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG

TABLE OF CONTENTS

PAGE

Introduction 1

Cross-Respondents' Position 2

1. The Sherman Act Claim 3
2. The Tort Claims 4
3. The Hypothetical Claims 5

Conclusion 6

Table of Authorities

Cases:

American Radio Association v. *Mobile Steamship Association*, 419 U.S. 215 (1974) 5

Baldovin v. *ILA*, 626 F.2d 445 (5th Cir. 1980) 5

Connell Construction Co. v. *Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975) 3

Council for Employment and Economic Energy Use v. *WHDH Corp.*, 580 F.2d 9 (1st Cir.), *cert. denied*, 440 U.S. 945 (1978) 4n

Crown Central Petroleum Corp. v. *Waldman*, 486 F. Supp. 759 (N.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980) 4n

Executive Jet Aviation, Inc. v. *Cleveland*, 409 U.S. 249 (1972) 5n

Fount-Wip, Inc. v. *Reddi-Wip, Inc.*, 568 F.2d 1296 (9th Cir. 1978) 4n

PAGE

Local 20, Teamsters, Chauffeurs & Helpers Union v. *Morton*, 377 U.S. 252 (1964) 5

Marjorie Webster Junior College, Inc. v. *Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) 4n

Missouri v. *National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980) 4n

National Society of Professional Engineers v. *United States*, 435 U.S. 679 (1978) 4

Navios Corp. v. *National Maritime Union*, 236 F. Supp. 657 (E.D. Pa. 1964), *aff'd*, 359 F.2d 853 (3d Cir.), *cert. denied*, 385 U.S. 900 (1966) 5

Osborn v. *Pennsylvania-Delaware Service Dealers Association*, 499 F. Supp. 553 (D. Del. 1980) 4n

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 5

United States v. *Fruehauf*, 365 U.S. 146 (1961) 6

United States v. *Hutcheson*, 312 U.S. 219 (1941) 4

Statutes:

29 U.S.C. §158(e) 3

29 U.S.C. §187 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1906

ALLIED INTERNATIONAL, INC.,

Cross-Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-respondents International Longshoremen's Association, AFL-CIO, Local 799, ILA, and their respective officers (hereinafter referred to collectively as "ILA") pursuant to the request of this Court dated July 8, 1981, submit this response to Allied International, Inc.'s cross-petition for a writ of certiorari.

Introduction

On April 3, 1981, cross-respondents, as petitioners, filed a petition for a writ of certiorari (No. 80-1663) to review the decision of the Court of Appeals for the First Circuit.[1]

---

[1] The decision of the First Circuit is now reported officially at 640 F.2d 1368 (1st Cir. 1981). It is also reproduced as Appendix A to the cross-petition herein. The district court's opinion is reported at 492 F. Supp. 334 (D. Mass. 1980) and is reproduced as Appendix C to the petition in No. 80-1663.

The petition focused specifically on the issues raised by that part of the First Circuit's decision which reversed the district court's dismissal of Allied's cause of action under § 303 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 187. This Court has not yet ruled on the petition in No. 80-1663. On May 5, 1981, Allied filed a cross-petition for a writ of certiorari (No. 80-1906) seeking review of the First Circuit's holdings adverse to it, specifically the affirmance of the district court's dismissal of the antitrust and tort claims set forth in the complaint.

Cross-Respondent's Position

Cross-respondents urge that Allied's cross-petition for a writ of certiorari be denied and that this Court limit its review to the issues raised by the First Circuit's decision with respect to the § 303 count.

As shown in ILA's petition, these issues are weighty and difficult, fully deserving of consideration by this Court. Indeed, the Solicitor General on behalf of the United States as amicus curiae has recommended that a writ of certiorari be granted to review them. They involve the meaning and effect of prior decisions of this Court, constitutional questions and conflicts between circuits on important issues of federal labor law.

By contrast, the issues raised in Allied's cross-petition involve only determinations by the court of appeals which were self-evident or hypothetical matters on which the First Circuit did not rule. For this Court to review these questions and require them to be briefed and argued would only serve as a distraction from the important labor law issues raised in the ILA's petition. The resources of the parties and the time of the Court should not be squandered

in addressing matters which are not in their own right worthy of the Supreme Court's consideration. The availability of other remedies is totally irrelevant to the determination of the § 303 issues. The mere fact that Allied's questions arise in a case which happens to involve other matters which the Court should review is no reason to bring before the Court matters which, standing on their own, would not merit attention.

1. *The Sherman Act Claim*

The First Circuit was unanimous in affirming the district court's dismissal of Allied's antitrust count on the ground that the activity complained of was not the kind of conduct the antitrust laws were designed to prevent. The lower courts were not only correct in this holding, but beyond reproach. Allied is unable in its cross-petition to cite any authority to the contrary.[2]

The two Supreme Court cases relied upon in the cross-petition add no substance to Allied's claim. Allied cites *Connell Construction Co.* v. *Plumbers and Steamfitters Local 100,* 421 U.S. 616 (1975) for the proposition that conduct "can be both a statutory secondary boycott and a violation of the Sherman Act" (p. 13). However, *Connell* involved not only a secondary boycott but also a "hot cargo" agreement, illegal under LMRA § 8(e), 29 U.S.C. § 158(e). The precise holding of the case is that, where a union conspires with an employer or other non-labor group, the existence of secondary pressure to enforce the illegal agreement will not insulate the union from antitrust liabil-

[2] The "conflicts between circuits" with which Allied seeks to bolster its cross-petition (pp. 6-10) refer to either the §303 or First Amendment issues already raised in ILA's petition or to the dissenting opinion below. In his dissent, Judge Aldrich discusses matters which were not passed on by the entire panel.

ity. *See United States* v. *Hutcheson*, 312 U.S. 219 (1941). In the case at bar, the ILA is not alleged to have acted in concert with any non-labor group, or even another labor group. Neither in its cross-petition nor before the courts below could Allied cite a single case where a union's unilateral action, not in combination with a non-labor entity, has been held to violate the antitrust laws. Similarly, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978) is inapplicable because it involved an anti-competitive agreement among *competitors*. Here, any agreement which might be made out was solely *within* the union, among persons not standing in a competitive relaship.

On the other hand, all of the reported cases[3] support the common-sense holdings below that activity engaged in for non-commercial or political purposes does not fall within the proscription of the antitrust laws. This unanimity among the lower courts does not require review by the Supreme Court.

2. *The Tort Claims*

The only decision by the First Circuit with respect to Allied's tort count was that, given LMRA jurisdiction, § 303 was the exclusive remedy, whether the tort sounded in state law or in admiralty. In this, the court of appeals was

---

[3] *See, e.g., Missouri* v. *NOW, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980); *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (N.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980); *Osborn* v. *Pennsylvania-Delaware Service Dealers Ass'n*, 499 F. Supp. 553 (D. Del. 1980); *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9 (1st Cir.), *cert. denied*, 440 U.S. 945 (1978); *Fount-Wip, Inc.* v. *Reddi-Wip, Inc.*, 568 F.2d 1296 (9th Cir. 1978); *Marjorie Webster Junior College, Inc.* v. *Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

merely applying a well-established rule, as to which no review is warranted.[4] That § 303 preempts state damage actions based on peaceful union secondary activity is not open to question. *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252 (1964); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). The First Circuit's application of the same rule to a possible "admiralty" tort is hardly of such note as to require a pronouncement by this Court,—especially in the absence of any contrary authority. *See Navios Corp.* v. *National Maritime Union*, 236 F. Supp. 657 (E.D. Pa. 1964), *aff'd*, 359 F.2d 853 (3d Cir.), *cert. denied*, 385 U.S. 900 (1966).

3. *The Hypothetical Claims*

The First Circuit's finding of §303 jurisdiction necessarily precluded the court from considering issues which would have been raised by a contrary decision.[5] Allied asks this Court to render an advisory opinion as to what result should obtain in the event the First Circuit's sustaining of the §303 count is reversed.

Cross-respondents seek review of the First Circuit's holdings with respect to §303 on various grounds. They urge that the decision on jurisdiction be reversed and the doctrine enunciated by this Court in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974) be applied. *See Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980). In the alternative, they urge that, if there is §303

[4] The dissenting judge, who would have sustained the tort count, did not disagree with the majority's holding on the exclusivity of the §303 claim. His opinion was premised on a finding that there was no §303 jurisdiction.

[5] Thus, the court of appeals left open the questions (treated by the dissent) of whether the allegations of the complaint were sufficient to state a tort claim under Massachusetts law and whether there was a sufficient nexus to maritime activity to bring the claim within admiralty jurisdiction. *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U.S. 249 (1972).

jurisdiction, the complaint be dismissed as insufficient to make out a secondary boycott. They seek, too, to invoke the protection of the First Amendment for the ILA's actions. If this Court grants cross-respondents' petition and reverses the First Circuit on any of the issues raised therein, questions may be generated with respect to Allied's other counts. But the time is not ripe for this Court to resolve those questions, since they were never addressed by the court below. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). Allied's dissatisfaction with the First Circuit's decision is no ground for granting a writ of certiorari to review holdings where the lower courts were on unassailable ground or to consider questions that were not decided below.

CONCLUSION

For the foregoing reasons, Allied's cross-petition should be denied, and this Court should limit its review of the First Circuit's decision to those issues connected with the §303 count raised in the petition in No. 80-1663.

Dated: August 6, 1981

Respectfully submitted,

THOMAS W. GLEASON
One State Street Plaza
New York, N.Y. 10004
(212) 425-3240

CONDON & DOYLE
75 Federal Street
Boston, MA 02110
(617) 542-4666
Attorneys for Cross-Respondents

Of Counsel:
ERNEST L. MATHEWS, JR.
CHARLES R. GOLDBURG